



## Labouring in the Public Interest

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# Labouring in the Public Interest

David Mangan \*

**Abstract:** Part of the difficulty in public sector labour relations is the apparently inevitable confrontation between government and civil service unions. This idea is sketched out here with particular attention to the inherently political nature of public sector education in England and Canada. Of the many characteristics of public sector labour relations, governments' dual role as employer and legislator remains the most distinctive. It provides an advantage which governing parties in both jurisdictions have used to their singular benefit. This power is also the source of limitations within the public sector labour relations framework. With little recourse via the law (grievances, legislation), teachers' unions have taken their message to the public in an attempt to improve their leverage in negotiations with government. Developing in the late 20th century, public campaigns have been a favoured means for highlighting issues which fit under the broad catchphrase of protecting quality in public education. Conversely, government may also implement its own rebuttal campaign based on the need for financial restraint. As part of this contest, both sides invoke the threat of public outcry as a force which each claims it may muster, for the purpose of maximising its bargaining position. This is the framework of contemporary public sector education collective negotiations. In effect, modern day public sector education bargaining has become the means of retrenchment: government, in a centralised funding arrangement such as that in England and Ontario, allocates money and dictates the terms of employment.

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## INTRODUCTION

In this paper, the labour relations framework for government and teachers' unions is sketched. Governments' dual role as legislator and employer (or at least funder) has highlighted the limitations of the public sector framework, thereby necessitating a different approach by teachers' unions. Campaigns have now become the normal means of representing teachers. The presumption that government works exclusively in favour of the public is challenged as it relates to education. Instead, it acts as a political party seeking to maintain its status as the governing party.<sup>1</sup> And so, public sector education labour relations are carried out in a manner which puts the public at the centre as the two sides vie for its support.

The interaction between government and teachers has traditionally occurred in the course of collective bargaining or, as has arisen more recently, some form of collective negotiation. The floor in these negotiations had been focused more on the financial cost. As governments approached the 21st century the floor was renovated to include schooling standards, with a similar focus on what work teachers performed. Emphases in collective negotiation began to reflect this move. It would hardly be hyperbolic to call the changes during the years leading to and immediately after the turn of the 21<sup>st</sup> century monumental.

In the first section, public and private sector labour relations are distinguished. The difference can be traced to the government's role as legislator and employer. The curiosity of education is that there is a private sector industry (in the form of independent schools), but it has not threatened to overtake its public sector counterpart. Recent proposals from the Coalition Government in 2010 have created a possibility that this might change.

The second section introduces the two jurisdictions under study. It provides an historical overview of events as they pertain to education reforms with an emphasis on events from the 1970s to the present day. Historically there is alignment in the course of events (though temporally the similar events occur about fifteen years apart). In each jurisdiction a Conservative Government comes to power after a 'left-leaning' government has been defeated. Once in office, the new governments radically reform education and centralise control in its hands. Unsurprisingly, labour relations unrest ensues, and there is a period of significant conflict between teachers and government. After about a decade of this labour turmoil new 'liberal' governments are elected to office. Their own plans for education reform are initiated. Hope for renewed labour relations accompanies these governments coming to power.

For this paper, the importance of reform efforts and teachers' work forms the emphasis. A government's education reform agenda necessarily affects teachers'

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<sup>1</sup> The point may be made of the other government portfolios.

work.<sup>2</sup> More recently, the impetus for improvements in the quality of education has been globalisation and its implications. Creating a more adept self-standing education system places greater emphasis on the role of individual teachers.<sup>3</sup> It is a simple equation in the education sector: ‘the success or failure of any scheme of educational reform depends upon the teachers’.<sup>4</sup> A research report on the reasons for high performing school systems identified three factors, all relating to teaching personnel: having the right people become teachers; developing these individuals into effective instructors; and putting in place ‘systems and targeted support to ensure that every child is able to benefit from excellent instruction’.<sup>5</sup> The importance of the labour force, specifically teachers, is unequivocal,<sup>6</sup> primarily because they are ‘inextricably linked to the integrity of the school system’.<sup>7</sup>

In the final section, the argument is put forward that government’s actions have become somewhat sacred in public sector education labour relations; that is, government retains a certain leeway with the public to make significant changes to education, and the presumption is that these changes are for the better. Consider the long-held assertion that government is the guardian of the public interest. The statement exposes a notionally antithetical commingling of the public benefit with politics. A modified perspective is endorsed. Instead of uncritically accepting government as working in the public interest when it comes to public sector education labour relations, the perspective put forward by the authors of *Clash of Rights* is advocated.<sup>8</sup> Political parties are in the business of politics which means that their job is to form and remain as the government.

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<sup>2</sup> ‘[...] the utilisation and cost of labour within a labour intensive service makes industrial relations a central concern’: M. Ironside and R. Seifert, *Industrial Relations in Schools* (London: Routledge, 1995), 3. The point is reiterated in the Government’s 2009 White Paper on education – ‘The ability of the school system to support every child and young person to achieve success depends most of all on the school workforce.’ Department for Children, Schools and Families, *Your Child, Your Schools, Our Future: Building a 21st Century School System* (London: TSO, 2009), 85.

<sup>3</sup> ‘Creating a worldclass education service was never going to be easy but that is what the economy and society of the future require. A modern teaching profession is central to this process. If teachers rise to the challenge of modernisation in the next few months they themselves, along with pupils and parents, will undoubtedly be major beneficiaries.’ Department for Education and Employment, *Teachers: Meeting the Challenge of Change*, Cm 4164 (London: TSO, 1998) (bold in original).

<sup>4</sup> H.C. Dent, *The Education Act, 1944: Provisions, Regulations, Circulars, Later Act* (London: University of London Press Ltd, 12th ed, 1968), 25.

<sup>5</sup> McKinsey & Company, *How the World’s Best-Performing School Systems Come Out on Top* (McKinsey, 2007), 13.

<sup>6</sup> Noted in a number of ways, most recently in the report of the Workforce Agreement Monitoring Group in the United Kingdom which wrote: ‘the school workforce is critical to raising standards’. Workforce Agreement Monitoring Group, ‘The National Agreement – Seven Years On’ (2010), at [http://www.socialpartnership.org/upload/resources/pdf/w/wamg\\_7\\_years\\_on\\_english.pdf](http://www.socialpartnership.org/upload/resources/pdf/w/wamg_7_years_on_english.pdf).

<sup>7</sup> *Attis v New Brunswick School District No. 15* [1996] 1 S.C.R. 825, at [43].

<sup>8</sup> P. M. Sniderman, J. F. Fletcher, P. H. Russell, P. E. Tetlock, *The Clash of Rights* (New Haven: Yale University Press, 1996).

## DISTINGUISHING PUBLIC FROM PRIVATE SECTOR LABOUR RELATIONS

Public sector labour is distinct from its private sector counterpart as ‘government is not just another industry’.<sup>9</sup> This section outlines, briefly, some of the distinctions for the purpose of better situating public sector labour relations.

Distinct from the traditional employer, government possesses legislative powers which permit a far-reaching variety of actions.<sup>10</sup> Government is democratically charged with making decisions on behalf of citizens.<sup>11</sup> The measure of this power has often been called the public interest.<sup>12</sup> Although one of the primary functions of any government, it is through the legislative authority that the government’s ‘agenda’ or overarching programme for managing its portfolios is given effect. The legitimacy of its conduct is drawn from the public or national interest,<sup>13</sup> and its exercise of this power is fettered by constitutional limitations, more particularly democratic accountability.<sup>14</sup> As a whole, the identity of government suggested by these characteristics is one of distinction.<sup>15</sup> Government as employer stands out as a distinct member amongst labour law’s ‘employers’. The uniqueness of public sector labour relations lies with the employer and not the employees.<sup>16</sup> Funded by taxes,<sup>17</sup> Government provides services for residents. Selling no product, government’s work is, in education, a monopoly. These points support a characterisation of public sector labour relations as ‘permanent exceptionalism’.<sup>18</sup>

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<sup>9</sup> C.W. Summers, ‘Public Sector Bargaining: A Different Animal’ (2003) 5(3) *University of Pennsylvania Journal of Labor and Employment Law* 441; ‘Public Employee Bargaining: A Political Perspective’ (1974) 83 *Yale Law Journal* 1156; H.W. Wellington and R.K. Winter, ‘The Limits of Collective Bargaining in Public Employment’ (1969) 78 *Yale Law Journal* 1107, 1120-1121.

<sup>10</sup> H.W. Arthurs, ‘Public Interest Labor Disputes in Canada: A Legislative Perspective’ (1967) *Buffalo Law Review* 39, 39. A.C.L. Davies, *The Public Law of Government Contracts* (Oxford: Oxford University Press, 2008), 4.

<sup>11</sup> G.W. Adams *The Private and Public Sector Collective Bargaining Environments* (Kingston: Industrial Relations Centre, Queen’s University, 1993), 10.

<sup>12</sup> G. Morris, ‘Employment in Public Services: The Case for Special Treatment’ (2000) 20 *Oxford Journal of Legal Studies* 167, 174.

<sup>13</sup> ‘National interest’ is the term used by Fredman and Morris. I equate this with public interest so as to better encompass the structure of the English and Canadian (the latter being a federalist system): S. Fredman and G.S. Morris, *The State as Employer: Labour Law in the Public Services* (London: Mansell, 1989), 6.

<sup>14</sup> Morris, *ibid*, 174.

<sup>15</sup> These characteristics as well as funding from taxation (already noted) and large bureaucracies constitute the five characteristics found in Morris, *ibid*, 6.

<sup>16</sup> C.W. Summers, ‘Public Sector Bargaining: Problems of Governmental Decisionmaking’ (1975) 44 *University of Cincinnati Law Review* 669, 670. There is debate on this point. The authors of one text claim there is no uniqueness to public sector labour relations: H. Collins, K.D. Ewing, and A. McColgan, *Labour Law: Text and Materials* (Oxford: Hart Publishing, 2nd ed, 2005).

<sup>17</sup> Morris, n 13 above, 174.

<sup>18</sup> L. Panitch and D. Swartz, *From Consent to Coercion: The Assault on Trade Union Freedoms* (Aurora: Garamond Press, 3rd ed, 2003), ch 3. Though the term is utilised to note government’s increasing intervention in all matters of labour law, the term is most apt in describing a theme throughout public sector labour relations.

In both jurisdictions, private or independent schools abound.<sup>19</sup> The seemingly tacit endorsement of government regarding independent schools continues to form a point of contention for teachers in government-maintained schools. The quite pointed regulation of teachers in maintained schools as compared to the relative freedom of those occupying positions at independent schools does little to defuse the matter. Tacit or open endorsement reached a peak during periods of Conservative governance. Conceptually, independent schools act as the ideal competition for public sector schools. However, the concept often referred to is in fact the more constrained ideal of independent schools whose names readily come to mind like well-established brand names. These schools have many benefits that a long history provides to such institutions, including active and generous alumni, the ability to turn away students, and facilities which often surpass those available in government schools. The term 'independent school' is quite a bit larger in scope than these elite institutions.<sup>20</sup> Independent schools include schools which are not so reputable. Relative to the layers of legislation found for government schools, independent schools are primarily governed by the Education (Independent School Standards) (England) Regulations 2003,<sup>21</sup> and the *Education Act*, sections 16-17, in Ontario. The standards set are relatively basic ones such as ensuring that students 'acquire skills in speaking and listening, literacy and numeracy skills'.<sup>22</sup> Independent schools are also subject to inspection.<sup>23</sup>

Competition between public and private schools is dissimilar to that found in other areas. First, there are a range of private institutions, but not all are of the calibre of the stereotypical schools with large campuses and high fees. Second, high fees have been a barrier to entry, and so public schools are not necessarily in danger of losing enough students to greatly diminish their numbers. While Ontario does have a private school system, the situation in England has become rather different in England recently. In the 2010 election, the Coalition Government announced a plan for greater local control over schools. Schools which have been rated as outstanding may be fast-tracked to academy status by the autumn of 2010. Part of the incentive is greater control over the work of the school. For example, academies have greater freedom over teachers' pay and can deviate from the national curriculum. The other initiative, free schools, permits any group to establish and operate a school, funded by government money but free from its control. This means that the parents of a local school (for example) may decide to take control of that school and would be able to do so. As it is early days, the details have yet to be worked out. It would appear though that public money

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<sup>19</sup> 'Public school' has been used in England to refer to schools which are independently operated. The phrase 'private school' will be used to underline the distinction in these schools from those which are publicly-funded.

<sup>20</sup> As demonstrated by the breadth of the definition of 'independent school' found in s463 of the Education Act 1996, c.56. A similarly broad definition is found in Ontario in s1 of the Education Act R.S.O. 1990, c.E.2.

<sup>21</sup> No. 1910.

<sup>22</sup> *ibid*, s1(2)(c).

<sup>23</sup> *ibid*, s6.

would still be used in these schools. So these would not be private schools entirely, though they would be privately administered. Compared to the private school system, academies and free schools may pose a significant threat to the stability of public sector education. The threat may be attenuated once local groups come to understand what is involved in governing a school. As well, the plan presents options for those parents who currently have children in schools, a form of governing parent council. Neither free schools nor academies have a long-term focus as to who would be governing the school. And so, as parents' children graduate from one school to another, there is potential for turnover in administration and thus a different form of instability. Chapter Five contains a critical elaboration of free schools and academies.

Returning to the traditional form of public / private sector divide, the private sector is more singularly focused. At its base, the virtually exclusive aim of profit-making points to the emphasis which the private sector places on economic concerns.<sup>24</sup> Private sector entities strive to satisfy customers insofar as that pertains to profits. There is no inclination towards the welfare of the public.<sup>25</sup> Market incentives carry great potency so that labour relations impasses often find resolution in mediating the economic factors which dominate.<sup>26</sup> Furthermore, collective bargaining tends to be quite different. While public sector employer negotiators often only represent others who are not at the table,<sup>27</sup> private sector negotiators do not necessarily need an agreement to be ratified by shareholders.<sup>28</sup> Although market forces shape private sector bargaining, the public sector contains 'a process of governmental decisionmaking shaped ultimately by political forces. The introduction of collective bargaining in the private sector restructures the labor market, while in the public sector it also restructures the political processes'.<sup>29</sup>

Underscoring the difference between the two areas, four characteristics of public sector employment may be identified.<sup>30</sup> First, decisions as to the terms and conditions of employment are made by the government. Market forces can influence these decisions, but such pressure is filtered through the political process. It is contestable whether this remains accurate. Globalisation (whether it is itself a market force or it compels market forces to act) has brought political considerations closer to market pressures so that services like education have become more results-oriented, where results means meeting market demand.

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<sup>24</sup> J. Makinson (Chair), *Incentives for Change: Rewarding Change in National Government Networks* (Public Services Productivity Panel, 2000), 5.

<sup>25</sup> Summers, 'Public Sector Bargaining', n 9 above, 442.

<sup>26</sup> Adams, n 11 above, 12.

<sup>27</sup> This is often called the 'ghost at the bargaining table problem' as it was put in *O.E.C.T.A. v Brant Haldimand-Norfolk Catholic District School Board*, [2001] O.L.R.B. Rep. 292. The procedural justification is that expenditures are approved at the legislative level: Summers, 'Public Sector Bargaining', n 9 above, 443.

<sup>28</sup> Summers, *ibid.*

<sup>29</sup> Summers, 'Public Employee Bargaining', n 9 above, 1156.

<sup>30</sup> *ibid.*, 1159-1160.

Second, the employer is ultimately the public – ‘the voters to whom the public officials are responsible’.<sup>31</sup> Summers astutely parses the public into two ‘overlapping groups whose interests differ: first, those who use the employees’ services and, second, those who pay for those services through taxes’.<sup>32</sup> The essence of these groups arises within the context of simple economics: ‘they want to maximize services and minimize costs’.<sup>33</sup> Third, there is an imbalance in support: those who are concerned with the economic interests at stake (ie increased taxes through increased pay for public sector employees) outnumber those who share employees’ interests. Public sector workers, so Summers argued, are at a ‘significant disadvantage when their terms and conditions of employment are decided through a process responsive to majority will’.<sup>34</sup> Pressure may be exerted by public employees in the public forum as this is a right which they have as citizens – though a unique right.<sup>35</sup> As governments have become preoccupied with expenditure, service delivery and global competitiveness, public pressure has become an increasingly utilised tool although this carried with it risks – an idea elaborated upon in the next section.

## **THE CURRENT PUBLIC SECTOR EDUCATION LABOUR RELATIONS FRAMEWORKS IN ENGLAND AND ONTARIO<sup>36</sup>**

### ENGLAND

The story of English Governments’ management of school teachers has been about as diverse as one may imagine. Since the 1970s, the metaphorical pendulum has swung widely in all sorts of different directions. Presently, a more prescriptive manner of regulation dominates. Managerialism of this form suggests a lack of trust in teachers’ work.

The post-war era of English education governance was one of state non-intervention. Schools and teachers managed most matters, such as curriculum.<sup>37</sup> Teachers at this time shied away from significant definition of their duties.<sup>38</sup> Their casualness towards their contracts spoke of a period in which duties were finite.

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<sup>31</sup> *ibid*, 1159.

<sup>32</sup> *ibid*.

<sup>33</sup> *ibid*.

<sup>34</sup> *ibid*, 1159-1160.

<sup>35</sup> *ibid*, 1160.

<sup>36</sup> As a form of comparative reference, the OECD’s Programme for International Student Assessment (PISA) found Canada in top 10 (at number 5), while England was identified as a system with promise of strong improvement: Organisation for Economic Co-operation and Development, at [http://www.pisa.oecd.org/document/50/0,3343,en\\_32252351\\_32236173\\_37627442\\_1\\_1\\_1\\_1,00.html](http://www.pisa.oecd.org/document/50/0,3343,en_32252351_32236173_37627442_1_1_1_1,00.html). This contrast is not part of the subject matter investigated here.

<sup>37</sup> C. Chitty, *Education Policy in Britain* (Hampshire: Palgrave Macmillan, 2004), 23.

<sup>38</sup> S. Fredman and G. Morris, ‘The Teachers’ Lesson: Collective Bargaining and the Courts’ (1987) *Industrial Law Journal* 215, 216.



As the years progressed, the parameters of duties became elastic, fitting in what the contemporary needs of students demanded.

Much of 20th century English public sector education labour relations can be traced back to the Whitley Committee.<sup>39</sup> Whitley vindicated collective bargaining as the foundation of industrial relations.<sup>40</sup> The Burnham Committee applied Whitley to the education sector, specifically teachers and lecturers, in 1919. Lord Burnham limited himself to the determination of teachers' pay and that decision shaped the area well into the late 20th century.<sup>41</sup> After some initial resistance, Burnham precipitated a lengthy period (1929-1964) of labour relations stability in this public service. Determination of all teachers' pay would be carried out through representations made by employer and employee at national joint councils;<sup>42</sup> codified in the Education Act 1944, section 89. The Secretary of State for Education possessed the power to simply accept or reject the Committee recommendations. Agreements reached at the Committee level were to be accepted by the Local Authorities.

The Remuneration of Teachers Act 1965 started a gradual movement away from collective bargaining.<sup>43</sup> Slowly, public sector incomes were emerging as a concern requiring action:

In one sense we can talk of a twenty year crisis between 1965 and 1985 during which time the Burnham variant of Whitley came under steady attack from various governments. There is no doubt that the trade unions and the vast majority of their members both favoured and benefited from the centralised national system of pay bargaining. The government was the greatest loser: the traditional cost-benefit analysis that government could control total wage costs through such central methods and avoid damaging national disputes eroded by both the strength of the union position and the weakness of the government's economic hold on public expenditure.<sup>44</sup>

The landmark Remuneration of Teachers Act placed the Department of Education and Science (DES) firmly within the Burnham framework and, more specifically, put it at the forefront of representation on the Management Panel. The jockeying of ministers to reconfigure Burnham into a cost certainty system

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<sup>39</sup> J. Whitley, *Interim Report on Joint Standing Industrial Councils*, Cm 8606 (London: HMSO, 1917).

<sup>40</sup> 'Collective bargaining, for which organised labour has been fighting for over a century, was authoritatively pronounced normal and necessary, and was extended, potentially if not actually, over the whole field of wage-employment for the market'. H. Clay, *The Problem of Industrial Relations* (London: Macmillan, 1929), 177.

<sup>41</sup> There was no push up to the 1970s to expand the purview of these committees beyond remuneration: B.A. Hepple and P. O'Higgins, *Public Employee Trade Unionism in the United Kingdom: The Legal Framework* (Ann Arbor: Institute of Labor and Industrial Relations, The University of Michigan-Wayne State University, 1971), 123.

<sup>42</sup> Ironside and Seifert, n 2 above, 25.

<sup>43</sup> See Remuneration of Teachers Act 1965, c.3.

<sup>44</sup> Ironside and Seifert, n 2 above, 25.

(by controlling the outcomes of pay determination) starts here and, in essence but without the Burnham structure, continues today. The passage of the Remuneration of Teachers Act is one of the early stages of identifying the limitations of Burnham as it led to the national pay strike of 1969. The late 1960s evidenced ‘the system was unable to deal with either incomes policies or industrial action’.<sup>45</sup>

Along with the prominence of the DES on the Management Panel, the vocal and powerful National Union of Teacher’s (NUT) loss of a majority on the Teachers’ Panel ‘allowed both the divisions among the teachers and the weakness among the employers to combine in rendering Burnham unworkable’.<sup>46</sup> The contrast in prominence makes this an intriguing observation. The system worked while the NUT maintained its majority. Conversely, the state’s dominant involvement in collective negotiation contributed greatly to rendering Burnham unworkable. The story of Burnham’s demise and the concurrent ascendancy of government’s direct involvement foreshadows the present day. There is much which can be inferred, but a search for norms from the above observation is premature at this instance.<sup>47</sup> It is sufficient to note the overarching result was that the collective negotiations system leading into the 1970s became unworkable.

A new order developed with the 1965 reconstruction of the Burnham Committee which saw the Department of Education and Science come to the forefront of decision-making. A change to the relationship developed amongst the Board of Education, national associations of local authorities and the teachers’ association had been signalled.<sup>48</sup> Two instructions were taken by teachers from this shift:

First, as in 1961, that their traditional focus on the D.E.S. alone could give them no influence in the formulation of national economic policy that so directly affected them. Second, as throughout the confrontation, that even when bringing pressure to bear on the D.E.S. the deputations and memoranda of a divided teachers’ lobby could not guarantee influence.<sup>49</sup>

Between 1973 and 1975, public attention was focused on William Tyndale Junior School in North London. At the centre were the teaching methods of its staff which were alleged to have diminished the importance of reading, writing, and

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<sup>45</sup> *ibid*, 27.

<sup>46</sup> *ibid*.

<sup>47</sup> Ironside and Seifert, n 2 above, continued at 28: ‘The trade union side bargaining with the employers as one. This meant fierce bargaining within each union and between the unions and this again led to intense rivalries and strange alliances. The dominance of the NUT for most of the period of Burnham, however, meant that it was able to control the teachers’ panel more or less effectively when it mattered. This was not the case with the equally divided employers. They too had to bargain as one, and they too were often bitterly divided by political loyalties and regional antagonisms.’

<sup>48</sup> D. Coates, ‘The Teachers’ Associations and the Restructuring of Burnham’ (1972) 20 *British Journal of Educational Studies* 192, 201-202 [footnotes omitted].

<sup>49</sup> *ibid*, 102.

arithmetic.<sup>50</sup> A report concluded in 1976 that there were some teachers on staff who had grossly mismanaged the curriculum.<sup>51</sup> In the immediate term, the scandal gave rise to considerable scrutiny of teaching methods. Long term, however, this incident assisted in grounding actions of the future governments of Margaret Thatcher, John Major, and Tony Blair to prescribe through legislation and other governmental tools what teachers shall do with students. The Tyndale scenario presented a compelling case for any politician to take aim at the work of the education system.

Opinion (correctly or otherwise) had changed. Government was required to provide leadership in education. Assessing the public impact of the scandal, Chitty concluded: ‘the William Tyndale Affair was conclusive proof that enormous harm could be done by a group of “progressive” teachers in a state school when parents were kept out of school decision-making and when managers and inspectors were clearly guilty of failing to fulfil their statutory duties’.<sup>52</sup> Newspapers wrote consistently during the late 1970s of a crisis in education – a failure of the system to sufficiently perform its work. Schools and teachers were blamed.<sup>53</sup> Into the breach stepped the Margaret Thatcher-led Conservative Party – earning an election victory in 1979. By that time, the fear was that the failure of schools would seep into industry and disrupt the economy as well.<sup>54</sup>

From 1919 to 1987, teacher pay was determined by the Burnham Commission, but for practical considerations the Burnham structure ended in 1985. This system provided for employer and teacher representatives to bargain in a committee over pay. Local Education Authorities (LEAs) remained teachers’ employers. Of advantage to LEAs, this model eliminated competition amongst LEAs for teachers – which may cause a wage competition – as well as the possibility of pattern bargaining amongst the teacher unions, which would likely yield similar wage competition. After two years of labour unrest, the Labour-dominated LEAs and the teacher unions reached a settlement regarding pay and conditions by working outside of the Burnham framework. The Thatcher Government refused to fund it. Instead it passed the Teachers’ Pay and Conditions Act 1987,<sup>55</sup> which abolished collective bargaining arrangements and vested power in the Secretary of State to impose pay and conditions by Order: ‘the

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<sup>50</sup> Chitty, n 37 above, 37.

<sup>51</sup> *ibid*, citing Auld Report: R. Auld, *William Tyndale Junior and Infants Schools Public Inquiry: A Report of the Inner London Education Authority* by Robin Auld, QC (London: ILEA, 1976).

<sup>52</sup> Chitty, n 37 above, 38.

<sup>53</sup> *ibid*, 38: ‘with teachers unable or unwilling to uphold standards, and managers, governors and inspectors incapable of tackling the malaise’.

<sup>54</sup> [Lord Young] argued, with the support of leading business people, that ‘schools were failing industry’ and, as Simon persuasively shows, ‘the strategy was now becoming clear – to shift the blame for what government policy had done to the schools onto the schools themselves – the teachers, administrators, even local government as a whole [...]’ He could have added trade unions to this list. This triumph of the New Right in education was finally secured through the 1988 Act and the use of assessment for all children as requested by Rhodes Boyson and the Black Paper authors in 1975. Ironside and Seifert, n 2 above, 22, citing B. Simon, *Education and the Social Order* (London: Lawrence & Wishart, 1991), 527.

<sup>55</sup> C.1.

legislation gives the Secretary of State virtually unrestricted powers to dictate teachers' terms and conditions'.<sup>56</sup> Teachers were mandated to work 195 days per year, 1265 hours and 'shall [...] work such additional hours as may be needed to enable him to discharge effectively his professional duties [...]'.<sup>57</sup> As was held in *Sim v Rotherham B.C.*,<sup>58</sup> teachers would be in breach of contract if they refused to undertake these duties. Prescription moved from the more typical employer items such as working hours to the essence of what teachers do. The legacy of the Education Reform Act 1988 remains the National Curriculum which it contained:<sup>59</sup> an itemisation of what teachers were to teach. LEAs remained employers of teachers, but only nominally for they had 'very few if any powers over the employment relationship, yet retain[ed] most of the burdens of employer'.<sup>60</sup> These two pieces of legislation embodied the government's desire to prescribe teachers' work, thereby diminishing any autonomy teachers previously enjoyed. The Thatcher Government had firmly taken control of the education portfolio – a bold move considering the scandal of the 1970s for one. It may have been a disguise – reclaiming education for the citizens – but the result appears to have been the one desired: with control centralised in the hands of the national government it could take the 'dominant role'<sup>61</sup> in the end product and also keep better control over costs in education, teachers' pay being at the forefront of those concerns. Under the John Major-led Conservatives, in 1991 the School Teachers' Pay Review Body (Pay Review Body)<sup>62</sup> was established and subsequently maintained in the 2002 reforms made through the Education Act 2002. The Pay Review Body's mandate was broad, but contingent. It must have considered any matter put before it by the Secretary of State which relates to: (1) 'the remuneration of school teachers',<sup>63</sup> or (2) other conditions of employment of school teachers which relate to their professional duties or working time.<sup>64</sup>

Labour relations unrest would seem to be an impoverished description, and yet, the decade during which Thatcher was in office has been regarded as a time of 'righting the ship' – if we are to draw any inference from the lack of wholesale legislative change by the 'New' Labour governments at the turn of the century to the amendments Thatcher ushered in. It has been contended that the genesis for the Thatcher / Major reforms can be traced to a speech by Labour's James

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<sup>56</sup> Fredman and Morris, n 13 above, 189.

<sup>57</sup> Kenneth Baker, H.C. Deb., Vol.111, col.589 (2 March 1987).

<sup>58</sup> [1986] I.R.L.R. 391.

<sup>59</sup> Education Reform Act 1988, c.40.

<sup>60</sup> *ibid*, 34.

<sup>61</sup> 'This position [...] hides a simpler truth which is that once education is treated as a traded commodity in a market then the purchasers of the product, the employers of labour, play an increasingly dominant role in the determination of the product itself.' Ironside and Seifert, n 2 above, 22.

<sup>62</sup> School Teachers' Pay and Conditions Act 1991, s.1 (repealed).

<sup>63</sup> Education Act 2002 s.120(1)(a).

<sup>64</sup> *ibid*, s.120(1)(b).

Callaghan at Ruskin College, Oxford in 1976 which, in part, makes the following pronouncement:<sup>65</sup>

I take it that no one claims exclusive rights in this field. Public interest is strong and legitimate and will be satisfied. We spend £6 billion a year on education. So there will be discussion [...] parents, teachers, learned and professional bodies, representatives of higher education and both sides of industry, together with the Government, all have an important part to play in formulating and expressing the purpose of education and the standards that we need.<sup>66</sup>

Callaghan's extolling of the need for standards and accountability in this speech planted a seed which the Conservative Party cultivated and let grow into quite a harvest. The Labour leader also ventured some criticisms of teachers which he endeavoured to balance with an equal amount of praise. The point, though, clearly was that all involved in education were being called upon to improve their work and be held answerable for what they did. The idea that Callaghan started (even rhetorically) and Thatcher finished off bridges nicely to the Blair era,<sup>67</sup> which, some now suggest, was nothing more than a continuation of the Conservatives' education policy in substance.

Moving ahead to the Blair era in English education, there was an abundance of hope with this change in government. From a general employment perspective, there has been much criticism of this period of time. There is substantial material here to be mined including the motivating ethos of the 'New Labour' government.

The idea of a partnership between labour and management is one which has been at play in the United Kingdom most distinctly under the Blair Labour Government. His 'Third Way' sought to provide all individuals with equal opportunities. He also paid particular attention to the education portfolio by endeavouring to establish teaching as more of a profession.<sup>68</sup> The Blair Government has faced its share of issues in regards to the management of education.<sup>69</sup> Still, there has been the notion of greater cooperation while Blair was in office – perhaps not a unifying force, but certainly not the divisive presence which Thatcher was to teachers.

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<sup>65</sup> R. Phillips, 'Education, the State and the Politics of Reform: The Historical Context, 1976-2001' in R. Phillips and J. Furlong (eds), *Education, Reform and the State: Twenty-Five Years of Politics, Policy and Practice* (London: Routledge, 2001); G. McCulloch, 'The Reinvention of Teacher Professionalism' in Phillips and Furlong, *ibid.*

<sup>66</sup> J. Callaghan, 'Towards a National Debate' (16 October 1976), reprinted in *The Guardian* (15 October 2001).

<sup>67</sup> Of more trivial interest, Blair refers to Callaghan's urging a national curriculum in 1976 in his Foreword to Department for Education and Skills, *Higher Standards, Better Schools for All: More Choice for Parents and Pupils*, Cm 6677 (London: TSO, 2005), 1.

<sup>68</sup> A. Smithers, 'Education' in A. Seldon and D. Kavanagh (eds), *The Blair Effect 2001-2005* (Cambridge: Cambridge University Press, 2005), 266.

<sup>69</sup> As noted by Smithers throughout his article, *ibid.*

If the Thatcher era redefined the work of teachers, the Blair era continued that effort.<sup>70</sup> Rather than accentuating their status as employees, Labour focused on outlining for teachers what it meant to be a professional. At the start, the new government was quite aggressive as noted in the agenda-setting White Paper *Teachers: Meeting the Challenge of Change*. Unlike the more antagonistic Thatcher era, however, the strategy employed during this period of time was to hospitably prod – though the prodding at times was not so cordial, especially early in the Blair mandate. In a discussion of the need to change teacher contracts, *Meeting the Challenge of Change* contained the following passage:

The current pay and conditions arrangements for teachers suffer from significant problems. While in theory they allow for excellence to be recognised in salary terms, in practice good classroom performance is not sufficiently rewarded. The excellence points allowed for in the present scheme have been awarded to fewer than one per cent of all teachers. Instead, teachers move up a pay spine almost exclusively on the basis of time served, regardless of performance, up to a maximum of nine points which are worth £22,410 at December 1998 rates. Beyond that, progression depends in practice on taking on additional responsibility outside the classroom.<sup>71</sup>

Disavowing a seniority model of reward, Labour established a new incentive-based teacher contract. It believed the seniority model was static and therefore inherently a disincentive for teachers to improve themselves. Professional lethargy then translated into a less effective education system. This syllogism cast doubt on the ‘culture’ of educators as a whole:

The main reason why the system has rewarded experience and responsibility but not performance is cultural. Heads and teachers have been more reluctant than comparable professional groups to distinguish the performance of some teachers from others, except through the award of responsibility points. The tradition, to which adherence remains powerful, is to treat all teachers as if their performance was similar, even though teachers themselves know that this is not the case. The effects have been to limit incentives for teachers to improve their performance and to make teaching much less attractive to talented and ambitious people than it should be. We are determined to create the conditions for this culture to change. We want to recognise and reward good performance and establish routes for real career progression. We want to reward teachers who are effective and whose pupils make good progress because of the motivation and inspiration they provide. We want to reward teachers who take on tough classes and deal with difficult children, and those who take the able to new heights. We recognise that many people working in

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<sup>70</sup> Whether the Third Way was liberal or neo-liberal is considered in A. Bogg, ‘New Labour, Trade Unions and the Liberal State’ (2009) 20 *King’s Law Journal* 403.

<sup>71</sup> Department for Education and Employment, n 3 above, 32.

schools make a substantial time commitment to carry out their professional duties. We want to reward teachers who contribute, with their expertise and their professional commitment, to raising standards of achievement and to the wider life of the school.<sup>72</sup>

From a casual glance at this passage, one may think that teachers are being accused of collusion: shielding underperformers in a manner which curtails any motivation colleagues may have. Motivated teachers (the majority according to *Meeting the Challenge of Change*) are called upon to break free from this culture and, in recognition of this endeavour, they will be rewarded. The models for education governance continued the prescription initiated in the later 1980s and added performance management. What is most evident is that what was a prescribed form of management (mandating specific work to be done) became performance management.

Supporting the idea that education reform started with Callaghan, elements of his influential 1976 speech are identifiable in the Blair years. In *Teachers: Meeting the Challenge of Change* the following call to new professionalism appeared:

All this demands a new professionalism among teachers. The time has long gone when isolated, unaccountable professionals made curriculum and pedagogical decisions alone, without reference to the outside world. Teachers in a modern teaching profession need:

- to have high expectations of themselves and of all pupils;
- to accept accountability;
- to take personal and collective responsibility for improving their skills and subject knowledge;
- to seek to base decisions on evidence of what works in schools in this country and internationally;
- to work in partnership with other staff in schools;
- to welcome the contribution that parents, business and others outside a school can make to its success; and
- to anticipate change and promote innovation.<sup>73</sup>

The policy re-formed this cadre of workers and envisioned them as an active, engaged collective aimed at a common purpose but each ready to make their individual contributions. The common complaint of teachers had been a static pay structure. Just as Callaghan did in 1976, *Teachers: Meeting the Challenge of Change* also contained questions regarding teachers' own static attitude:

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<sup>72</sup> *ibid*, 32-33.

<sup>73</sup> *ibid*, 15.

Teachers too often seem to be afraid of change and therefore to resist it. Teachers have too often felt isolated. Many seem to believe they are unique victims of the process of constant change, although the reality is that in many other sectors change has been more revolutionary and had greater impact on pay, conditions and styles of work.

Poorly managed change, conflict in the 1980s and early 1990s and uncertain funding for education over many years have also made their contribution to this state of affairs. Worst of all, there has been a widespread sense among many teachers and their leaders that nothing can be done to change it. The fatalistic view – which adds to the sense of despondency – seems to have been that it has to be this way.<sup>74</sup>

Clearly, the Government (which carried the country's aspirations for change) had identified a profound need for reform beyond curriculum. Performance legitimacy was the object of public education governance and yet the means of addressing the issue ran contrary to the role government had taken in other domestic affairs. If government was required to oversee matters, then it should do so in the least intrusive manner. This entailed government not being involved in 'standard setting and enforcement of responsibilities.'<sup>75</sup> In education, government was overtly intrusive.

In contrast to the decentralisation efforts of 'typical' neoliberal governments, the Ontario Provincial Government of the mid-1990s to the turn of the 21st century centralised the management of the education system so that financing was determined by the Government and not by School Boards. The power to tax (raise the mill rate) was taken away from school boards. For the purposes of administrative efficiency, money came directly and only from the Ministry. The Government also assumed the responsibility for supervising school boards, making it illegal for a school board to run a deficit. The rationale for this assumption of financial responsibility by the Government had been closely linked with the Government's election platform of significant income tax reduction for Ontarians.

## ONTARIO

Ontario teachers have long been organised into associations, but did not gain the collective bargaining rights enjoyed by their English counterparts until 1975. For almost all of the first half of the twentieth century, teachers voluntarily joined one of the teacher associations. In 1944, the minority Progressive Conservative government (Conservative) passed the *Teaching Profession Act*.<sup>76</sup> This was a remarkable event for its labour relations significance. The voluntary teacher

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<sup>74</sup> *ibid*, 16.

<sup>75</sup> Smithers, n 68 above, 873.

<sup>76</sup> R.S.O. 1990, c.T.2.



organisations had been endeavouring to enact a provincial body. Representatives at the time believed they were not taken seriously by any government because voluntary membership meant that any one association did not speak for all teachers.<sup>77</sup> A motivating concern among teacher representatives leading up to 1944 centred on the two leading identities for teachers which remain a focus for debate today: ‘There was some concern in some areas [for example the government] that [if] teachers didn’t get the official *Teaching Profession Act*, they would certainly consider union membership’.<sup>78</sup> For the government’s part, this seeming benevolence was in fact a product of political strategy. The Progressive Conservatives sought to shore up their support during their minority government term. Fearing that teachers would be swayed by the socialist Cooperative Commonwealth Federation,<sup>79</sup> the government passed the *Teaching Profession Act* which rendered membership in the newly created Ontario Teachers’ Federation (OTF) mandatory. The existing teachers unions (five at the time, now four with the dissolution and merging of work between the men and women elementary teachers federations) formed the directorate of the Ontario Teachers’ Federation. Each union drew its membership from the Ontario Teachers’ Federation, in this union shop framework. To illustrate, a Catholic elementary school teacher would be assigned to the Catholic teachers union. Representation of Ontario’s teachers remains structured in this manner presently.

Negotiations prior to and after 1944 were conducted in the nature of a ‘gentleman’s agreement’. While the teachers’ unions were not officially teachers’ bargaining agents, it was accepted by school boards that contract negotiations regarding remuneration (this was the sole issue for some time until the teachers fought for bargaining over workplace issues) would be conducted with teachers’ union and not the individual teachers. Although distinct from events in England at the same time, the *de facto* arrangement fits within the framework established by the Teaching Profession Act. During this time, a scale was set for teachers’ salaries.<sup>80</sup> Although teachers only gained the right to strike with the passage of legislation in 1975, an increasingly militant brand of teachers effectively utilised ‘mass resignation’ as a viable alternative during the late 1960s into the 1970s. This strategy proved useful only because all teacher employment contracts contained

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<sup>77</sup> According to Helen Sheppard of the Federation of Women Teachers: ‘There wasn’t any communication [with the Provincial Government]. I think [the provincial government] denied us because I don’t think we have the numbers or force to go there and say this is what the teachers want. Every time we went, they would say how many do you represent? And we would say, 16% of the teachers. [...] now we could speak, we could go to the government, we had a voice and they had to listen to us.’ *History Project Meeting* (Verbatim Minutes, 26 March 1986) (unpublished), 14.

<sup>78</sup> As outlined by Nora Hodgins, who in 1944 became the first Secretary-Treasurer (most senior executive, non-elected position) of the Ontario Teachers’ Federation. *ibid.*, 29.

<sup>79</sup> ‘[T]he successful efforts of the Cooperative Commonwealth Federation (CCF) to attract teachers to its party and the possibility of teachers strikes’. S. Lawton, G. Bedard, D. MacLellan, and X. Li, *Teachers’ Unions in Canada* (Calgary: Detselig Enterprises Ltd, 1999), 26.

<sup>80</sup> The scales were different based on gender. Equal pay did not become a fertile issue until the mid-1980s with the passage of the Charter of Rights and Freedoms.

one of two possible resignation dates. With all teachers resigning on one of those dates, school boards were left without staff for classrooms. The two-date system may have had administrative advantage; however, school boards quickly learned its labour relations implications. School boards still had the power to walk away from the table and unilaterally impose terms – though to do so would, as the years progressed, raise the ire of the ever more vocal teachers.

From 1975 until 1996, teachers and school boards engaged in collective bargaining under the School Boards and Teachers' Collective Negotiations Act.<sup>81</sup> The Act sought to resolve issues which had lingered for much of the 1970s. By the mid-1970s teachers' militancy had crystallised, having established themselves as a formidable group for their employers. The Act responded to ardent opposition to the existing structure of negotiations. Teachers demanded the right to negotiate workplace issues while school boards remained equally adamant that nothing but remuneration should be discussed. The government had tried to remain separated from the issue for some time. With high levels of discord, it was forced not only to enter the fracas but to also seek a resolution which satisfied both employers and employees. Collective bargaining and sweet reason had not prevailed.<sup>82</sup> The School Boards and Teachers' Act established a more traditional labour relations framework within which the parties were to conduct themselves. It permitted negotiation of workplace items,<sup>83</sup> a procedure for negotiations,<sup>84</sup> voluntary binding arbitration,<sup>85</sup> the right to strike,<sup>86</sup> and the right to lock out.<sup>87</sup> And so, government entered into this conflict to facilitate an improved structure for ongoing relations. This contrasts sharply with the Act's repeal in the mid-1990s. Although there was debate throughout the two decades in which the School Boards and Teachers Act existed, there was no strong evidence of its failure to provide an amenable system for education labour relations.

What had been completed in 1975 was removed in the mid-1990s during an unprecedented time of education reforms carrying serious labour relations implications. Then newly-elected, the Conservative government created a system of centralised control (approximately ten years after the Thatcher Conservatives did so in England), but one in which they were buffered from the immediate discontent expressed of their agenda:

Instead, it has pursued a strategy based on centralized control over education, but no direct involvement in negotiations, leaving responsibility for bargaining in the hands of local school boards. Although the government sought to minimize its visibility and political accountability, the experience of

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<sup>81</sup> S.O. 1975, c.72, repealed by Education Quality Improvement Act 1997, c.31, s.178 [School Boards and Teachers' Collective Negotiations Act].

<sup>82</sup> Arthurs, n 10 above, 52.

<sup>83</sup> School Boards and Teachers' Collective Negotiations Act, n 81 above, section 8.

<sup>84</sup> *ibid*, Part II, consisting of sections 9-12.

<sup>85</sup> *ibid*, section 29.

<sup>86</sup> *ibid*, section 63.

<sup>87</sup> *ibid*, section 69.

the last two bargaining rounds indicates this strategy has not been successful.<sup>88</sup>

The government of the period may well be known for ‘creating a crisis’ in education. It raised public concern as to what was being done in Ontario schools calling for greater quality while simultaneously taking billions of dollars out of the system – some charged the removal of money was only to fulfill an election promise of across the board tax reductions. Regardless of the motivation, by centralising funding in the hands of the provincial government, public sector teacher unions were compelled to refocus their efforts on the Ontario Government instead of local school boards. In common parlance, they followed the money. At present, collective bargaining occurs with the individual school boards, but the significant workplace and remuneration issues are initially engaged with the government via a framework agreement. Just as in England, the government is now very much at the centre. Still in a state of change, developments in the latter part of 2008 suggest that the provincial agreement has embarked on proactive resolution of labour issues by inviting all the parties together to devise a framework agreement.<sup>89</sup>

### **CHALLENGES IN PUBLIC SECTOR EDUCATION LABOUR RELATIONS**

Teaching remains a curious realm of work when analysed within a public / private dynamic. Although there has always been a healthy (though not dominant) independent school contingent of teachers, teaching is more accurately described as a lopsided employment arrangement in favour of the public sector. With the majority of teachers being hired by the government-funded system, teachers have not been in a strong position to ‘shop around’ for a better paying job. Government possesses the power to dictate an agenda within which teachers carry out their work. Teachers’ unions may bristle at this framework (if not the exercise of this power), and their efforts to change it may yield some modifications, but certainly will not halt the momentum of a government agenda.

An underlying assumption respecting the exercise of its power is that government acts in the public interest. This idea contributes to a full discussion of the essence of public sector labour relations; most particularly the state’s role as neutral party within the industrial pluralist system. The work performed by public

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<sup>88</sup> J.B. Rose, ‘The Assault on School Teacher Bargaining in Ontario’ (2002) 57 *Relations Industrielles* 100, 122. If nothing else, Ontario teacher unions did not exert the kind of influence which American legal scholars feared they most certainly would.

<sup>89</sup> This is the result of a framework agreement agreed to by the government, school boards associations, and two of the teacher unions.

sector employees can be situated in differing notions of the public interest. In the *State as Employer*, the authors wrote of taxation in relation to industrial action:

[...] the government derives the revenue to pay its employees primarily from taxation and not primarily from payments made by the public for services rendered by its employees. In effect, this allows governments when dealing with their employees to override commercial concerns in favour of political and macroeconomic factors. This has a particularly important impact on the role of industrial action in the public services. It is unusual for industrial action to have a substantial financial effect on government. Instead, trade unions rely on the political pressure which may result from the disruption in services to the public. However, governments may decide to ignore whatever political pressure is generated and withstand a strike if such a strategy is deemed to be politically desirable.<sup>90</sup>

With a presumption of acting in the public interest, governments could be insulated from the traditional methods of collective action which may be used to pressure other employers to acquiesce.

Since the 1970s, the focus for trade unions has evolved into greater concern for ‘the functioning of the labour market and the economy’.<sup>91</sup> With this further factor, tolerance for public sector militancy (notably in the form of strikes) has waned. As the welfare state began to break down, the state’s willingness to continue with its large body of employees also diminished; having identified a need to ‘reduce budget deficits by limiting the size and costs of the public sector’.<sup>92</sup> Consequently, public sector unions must refine their strategies and not simply rely on industrial action such as strikes. Pressure may be put on the government in other forms, such as public engagement on specific issues. Public sector unions’ pressure has primarily focused on government initiatives which were most often the subject of legislation. Legislation can engage the full range of items affecting its employees, from their working conditions to their remuneration.

Government has held the decision-making power for public sector labour relations – a power which public sector unions have feared government (ab)use of this power as a means of ameliorating its position as employer.<sup>93</sup> It can legislate workers back to their jobs as well as put forward legislation which limits union activities or set different parameters for the employment relationship. The framework of government provides legitimacy.<sup>94</sup> The ideal of a legislature is that

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<sup>90</sup> Fredman and Morris, n 13 above, 7-8.

<sup>91</sup> N. Bruun and B. Hepple, ‘Economic Policy and Labour Law’ in B. Hepple and V. Veneziani (eds), *The Transformation of Labour Law in Europe* (Oxford: Hart, 2009), 31.

<sup>92</sup> *ibid.*, 47.

<sup>93</sup> J. Sack and T. Lee, ‘The Role of the State in Canadian Labour Relations’ (1989) 44 *Relations Industrielles* 195, 203, 204.

<sup>94</sup> G. White, ‘The Legislature’ in G. White (ed), *The Government and Politics of Ontario* (Toronto: University of Toronto Press, 5th ed, 1997), 72.

through fertile debate laws and policies are brought into existence. This formal process leads to a somewhat romanticised version of governance in which legislation is presumed to be made in the public interest. This is not necessarily the case. A majority government may usher through its policies and laws with little formal debate. This work may be in the public interest, but the frequent criticisms of laws highlights the term's differing notions; that is, to what segment of the public does the legislation speak. This is not a debate about democracy. These comments are intended to underline that the public presumes key characteristics in government which it is not readily willing to identify in unions.

To contrast, government has been often portrayed as representing the public interest while teachers' unions have been classified as self-interested. The assertion's premise remains an extrapolation of a truth. Certainly, public sector unions are self-interested insofar as the welfare of their members forms the primary concern. However, members' interests can be situated within the public sector structure. It would take a weak government to give away without obtaining something in return, for example, a high salary with a reduction in workload during a round of negotiations. Although there are those who have claimed that public sector teachers' unions cost taxpayers because their members are paid more than they should be,<sup>95</sup> when broad factors (such as quality of those recruited and the ability to retain these individuals) are considered, it remains hard to be convinced about the accuracy of such claims.

Government's public functions contrast – some may say conflicts,<sup>96</sup> – with its role as employer. The public sector collective agreement has stood out as 'a product of government decision making' because it 'directly determines the terms and conditions that the government entity must provide, and it establishes the administrative structure and procedure to implement and enforce that government decision'.<sup>97</sup> There has been a premium placed on the public interest. Three elements, identified in the literature, have comprised the public interest. First, government retains the obligation to work responsibly with tax money.<sup>98</sup> Second, government services, provided through its employees, must be run in an effective manner. Finally, the insatiable public desire for lower taxes with more services,<sup>99</sup> continues to run contrary to a more practical labour relations point of view of paying a reasonable wage and providing good working conditions.<sup>100</sup> This analysis of the public interest exalts the view that government acts in the public's interest and, therefore, endeavours to mediate between the demands of public employees and the expectations of the voting public.

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<sup>95</sup> This remark is most often found in American literature such as: F.H. Hess and M.R. West, *A Better Bargain: Overhauling Teacher Collective Bargaining for the 21st Century* (American Enterprise Institution, 2005).

<sup>96</sup> As S. Goldenberg discussed in *Public Sector Bargaining: Implications for White-Collar Unionism* (Kingston: Industrial Relations Centre, 1973), 27.

<sup>97</sup> Summers, 'Public Sector Bargaining', n 9 above, 1142.

<sup>98</sup> Goldenberg, n 96 above, 12.

<sup>99</sup> Summers, 'Public Sector Bargaining', n 9 above, 674.

<sup>100</sup> Goldenberg, n 96 above, 13.

## ACCOUNTABILITY IN PUBLIC SECTOR LABOUR RELATIONS

Commentators have referred frequently to the prominence of politics in public sector labour relations.<sup>101</sup> Though it may be an ‘obvious’ point, it is one which is underestimated.<sup>102</sup> The prevalence of politics in education labour relations arguably has its origin as the dominant force it is today in the 1970s. That decade was a time of conflict between trade unionism and the pronounced economic issues of the day which precipitated such antagonistic policies as wage restraint.<sup>103</sup> This conflict gave rise to the greater presence of politics in industrial relations overall, and education can be pinpointed as one of the better examples of this clash.

The political can bring ‘unwanted complexity’.<sup>104</sup> Rather than deriving an understanding of the political from a theory of the state, the concept of the state presupposes the concept of the political.<sup>105</sup> Political parties form governments, and the public accepts this substance in government. Indeed the very nature of public sector labour relations strikes at the heart of the political because any remuneration package provided by a collective agreement necessarily affects the public and incurs public scrutiny. It would seem plain that public sector unions especially should play a political role for its members: ‘[...]for any interest group it is essential to ensure that the legal and economic environment is hospitable to its goals and operations and that the views of its members are adequately represented in the political process by lobbying and other means’.<sup>106</sup> Public opinion constitutes an essential barometer for government initiatives: ‘With the results of public sector bargaining frequently affecting the general public more than the parties to the dispute, public opinion must be an important factor in determining bargaining tactics.’<sup>107</sup>

Politics is a multi-faceted term. In public sector labour relations, government decision-making is political, but the factors considered within that term extend beyond economics.<sup>108</sup> What is meant by ‘politics’? Loughlin provides an important dissection of the term. The modern state endures tension between autonomy and

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<sup>101</sup> See for example, Summers, ‘Public Employee Bargaining’, n 9 above. Richard Freeman calls the ability of public sector unions to influence government through the political process a ‘fundamental difference’ between public and private sector unions. R. Freeman, ‘Unionism Comes to the Public Sector’ (1986) 24 *Journal of Economic Literature* 41, 42, 52.

<sup>102</sup> R. Clark Jr, ‘Politics and Public Employee Unionism: Some Recommendations for an Emerging Problem’ (1975) 44 *University of Cincinnati Law Review* 680, 680, writes: ‘Unlike the private sector, where collective bargaining takes place in an environment in which market forces largely predominate, collective bargaining in the public sector must take place in a political environment. Despite this obvious fact, too little attention has been paid to the political aspects of public sector collective bargaining and the potential problems and distortions of the political process that will result if remedies are not instituted.’ Clark focuses exclusively on what he sees as the disproportionate influence which public sector unions wield. The point, however, may be more extensively applicable to both government and unions.

<sup>103</sup> Bruun and Hepple, n 91 above, 45.

<sup>104</sup> Makinson, n 24 above, 5.

<sup>105</sup> M. Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2004), 32.

<sup>106</sup> S. Deakin and G. S. Morris *Labour Law* (Oxford: Hart Publishing, 4th ed, 2009), 731.

<sup>107</sup> Goldenberg, n 96 above, 13.

<sup>108</sup> Wellington and Winter, n 9 above, 1116.

collectivism. It is within attempts to find a balance between these that politics is situated:

Politics emerges as a product of contests for authority in government; it arises only when the composition and conduct of governmental authority is debated, criticized, and determined. Politics is a consequence of the recognition that the arrangements of government are the result of human choice.<sup>109</sup>

Given this power, the decision-making process of government is the content of politics. Within politics, there is arguably an element of best intentions where choices are made ‘between rival goods in circumstances where there can be no authoritative yardstick for resolving differences’.<sup>110</sup> Weber writes of politics: ‘we will understand it as the leadership, or the influencing of the leadership, of a *political* group body, or [...] *state*’.<sup>111</sup> Not as evident in literature on public sector labour relations, influences on government decision-making are often a surreptitious factor. Citizens accept the idea that this occurs, but the details or extent of the influence is too often hard to pinpoint. Nonetheless, these influences and how they are expressed play a formative role in governance.

These influences fall under a broad premise which informs this analysis: ‘Politicians are in the business of politics.’<sup>112</sup> This means that political parties are looking to form the government. This process is ongoing as a sitting government will seek to demonstrate skilful handling of its various portfolios as a means of reinforcing their place in power. Since political parties are in the business of being elected to govern,<sup>113</sup> their platforms are developed so as to maximise the votes cast in their favour. To achieve this aim, politicians will galvanise voters by identifying and pressing issues which are valued by one group over another. A political party will not likely use a platform of one issue, but a combination of ‘values’. The aspiration is to gather sufficient support from both the interplay of issues as well as specific points of interest for voters. Around the turn of the 21st

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<sup>109</sup> Loughlin, n 105 above, 155.

<sup>110</sup> *ibid*, 156.

<sup>111</sup> M. Weber, ‘Politics and the State’ in S. Whimster (ed), *The Essential Weber: A Reader* (New York: Routledge, 2004), 130.

<sup>112</sup> Sniderman, et al, n 8 above, 252. The authors seek to debunk the theory of democratic elitism (articulated by authors such as S. Stouffer, *Communism, Conformity and Civil Liberties* (New Jersey: Transaction Publishers, 1992)). Stouffer’s work lead to significant research in the area of elite values. For example, H. McClosky and A. Brill, *Dimensions of Tolerance: What Americans Believe about Civil Liberties* (New York: Russell Sage Foundation, 1983) and J.I. Sullivan, J. Piereson, and G.E. Marcus, *Political Tolerance and American Democracy* (Chicago: University of Chicago Press, 1982) as an accurate portrayal of the value dynamics in North American society. Sniderman, et al, *ibid*, find that in the contestation of rights (ie freedom of speech, association), political elites are neither more nor less progressive than the general public. (The content of the ‘general public’ is a point which the authors did not address in similar detail as they did with political elites. R.V. Ericson notes this in his review of the book: (1998/1999) 68 *University of Toronto Quarterly* 375. This fact mitigates the comparative contribution the authors seek insofar as they are comparing political elites with the general public.)

<sup>113</sup> Sniderman, et al, n 8 above, 241.

century, campaigns have focused on tax reduction and strict management of public services, thereby playing on public aversion to paying tax at all.

Education (and particularly teachers) has been a subject which political parties can exploit for political gain. A host of stereotypes (for example teachers being 'lazy') can be utilised. Teachers do not hold a position of vast respect such as a doctor for technical knowledge or years of training (a reason why education can be a more vulnerable topic than health). There is no accepted method of teaching – especially with immense cultural diversity and learning needs amongst students. The system is one of the largest expenditures for any government (along with health). A large percentage of any electorate has children, but, more importantly, there is not a general consensus as to how to effect an improved education system for the 'globalised world'.

Not entirely an admirable situation, centralised control can give rise to an 'intolerable' situation in education: 'Local government administrators are helplessly caught between employee compensation demands, public unwillingness to vote for increased operating millage levied on property, and the state legislature's reluctance to allow local governments the freedom to impose income, sales, or excise taxes.'<sup>114</sup> The flaw in this framework is that maintaining such a scenario where local governments (here school boards) do not possess the 'authority commensurate with their bargaining responsibilities is hardly likely to be in the public interest'.<sup>115</sup> Central government is buffered from some of its less popular decisions by this extra 'layer' of governance. As they are in tort law,<sup>116</sup> so too are local education authorities left open to fervent criticism leading to litigious positions.

The position of teachers' unions in relation to government in a centralised management framework remains to be situated within the framework laid out above. Government has an advantage in its role as both employer and legislator. Public sector unions, conversely, carry the responsibility of effective representation of their members. When these two mandates conflict (as local authorities appear to be squeezed out of the picture), it is the prerogative of the democratically elected government which will trump. One example had been played out in early 1960s England when the Government, concerned with public spending, injected itself into the Burnham Committee. When Government's will was still not satisfied, it vetoed pay settlements arrived at by the Committee.

American legal scholars have paid particular attention to the tensions which, they believe, pull at government when engaged in negotiation with its employees. Wellington and Winter suggest that government is caught between the demands of the public, who are voters, and those of public sector employees. Both aspects combine to exert enormous pressure on government.<sup>117</sup> Within the discussions in

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<sup>114</sup> C. Rehmus, 'Constraints on Local Governments in Public Employee Bargaining' (1969) 67 *Michigan Law Review* 919, 923.

<sup>115</sup> *ibid*, 930.

<sup>116</sup> T. Weir, 'Governmental Liability' (1989) *Public Law* 40, 47-48.

<sup>117</sup> Wellington and Winter, n 9 above, 1121.



the literature on the role of government, the underlying premise has been government stands for the best interests of the people. Characterisations of unions, conversely, include how collective bargaining provides them with the unfettered opportunity to corner politicians; giving unions' voices 'added effectiveness'.<sup>118</sup> One example of this type of attitude is as follows:<sup>119</sup>

My thesis is that the extension of broad collective bargaining rights to public employees when coupled with the ability of public sector unions to participate actively in the election of the officials with whom they negotiate at the bargaining table gives public sector unions a disproportionate amount of power which will distort the political process. In this regard, public sector unions which wield both political and collective bargaining power in their dealings with employers are akin to the factions discussed by James Madison in *The Federalist No. 10*: 'By a faction, I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.'<sup>120</sup>

Public sector unions are 'factions' whose effects legislation must control.<sup>121</sup> They are antagonistic and act in defiance of the public interest.<sup>122</sup> The influence which these unions have creates imbalance.<sup>123</sup>

According to these authors, unions represent the best case for regulation because unions possess an unfair advantage. The following quotation demonstrates this with reference to public sector education:

The board will be confronted directly by the union's demands with no equivalent articulate counter-pressure from other interested groups. Once the agreement has been made at the bargaining table, it is difficult to block it at the ratification stage unless it has substantial impact on the budget. This gives the union, as the representative of the teachers, a larger and more effective voice in the decision than if there was no collective bargaining. It largely precludes the voters from having an effective voice. The effect of collective

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<sup>118</sup> Summers, n 16 above, 674. In other words, there is no other 'interest group' involved. *ibid*, 447.

<sup>119</sup> Clark, n 102 above, 681. The requirement in the *Crown Employees Collective Bargaining Act*, S.O. 1993, c.38 of political neutrality of bargaining agents echoes Clark's concern. D.D. Carter, 'Legal Regulation of Collective Bargaining in the Ontario Public Sector' (1974) 29 *Relations Industrielles* 776, 783.

<sup>120</sup> J. Madison, *The Federalist No. 10* in R. Hutchins (ed), *Great Books of the Western World*, vol 43 (USA: Encyclopaedia Britannica Inc, 1952), 50-51.

<sup>121</sup> Clark, n 102 above, 680.

<sup>122</sup> *ibid*, 688.

<sup>123</sup> *ibid*, 683.

bargaining is to significantly change the political process, removing subjects of bargaining from effective public discussion.<sup>124</sup>

Coupled with these ideas regarding collective negotiations, it has also been suggested (and one may editorialise that it is rather easy to contend this, but harder to render this a general principle of teacher union representation) unions do not speak for all members.<sup>125</sup> Theories which view unions as having a distinct advantage do not contemplate a union settling for anything less than what is demanded.<sup>126</sup> It is no secret that financial issues have long posed a limitation on union demands in the public sector. Financial realities (even perceived) form ready-made counter-arguments to union demands. Indeed, these realities can only embolden politicians as they stand fast against union demands. These ideas are equivocal regarding the exaggerated notions of unfettered union power, detectable in these critical views.<sup>127</sup>

Government is both decision-maker which is politically accountable and political party which is also seeking to maximise its own electoral capital with these decisions.<sup>128</sup> Voters, who ultimately pay for wage increases, exhibit distemper towards tax increases. In turn, tax payers demand more services while maintaining the same rates of public employee pay. Since taxpayers outnumber public employees, the parameters of collective bargaining need to protect employees in order to 'counteract the overriding political strength of other voters who constantly press for lower taxes and increased services.'<sup>129</sup> Put in terms of employee remuneration, public sector workers should not be subsidising the services they provide. A disproportionate pay system may also be required in order to address entrenched social concerns.<sup>130</sup> The difficulty remains in achieving a balance which 'provides effective and fair procedures to the disputants, supplies an effective set of dispute resolution interventions to assist them, protects the public interest, and is relatively low-cost.'<sup>131</sup>

It is perhaps the ideas Loughlin proffers which reveal why unions are branded a negative influence. Referring to Tawney's work, Loughlin writes: 'Rights, he suggests, express a principle of division and enable individuals to resist, whereas

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<sup>124</sup> Summers, 'Public Sector Bargaining', n 9 above, 447.

<sup>125</sup> Summers writes in 'Public Sector Bargaining', n 9 above, 448: 'However, when disciplinary rules are bargained for, the teachers may have different and conflicting views, yet the union as exclusive representative purports to speak with a single voice for all teachers. With bargaining behind closed doors, the teachers who disagree will have no opportunity to be heard.'

<sup>126</sup> S. Cohen, 'Does Public Employee Unionism Diminish Democracy?' (1979) 32 *Industrial and Labour Relations Review* 189, 189.

<sup>127</sup> *ibid*, 190.

<sup>128</sup> Summers, n 16 above, 672.

<sup>129</sup> *ibid*, 675.

<sup>130</sup> For example, education action zones in England have been created in order to raise educational standards in areas identified as deprived. Upon approval by the Secretary of State, a pay and condition order will not apply to teachers in a particular school within an education action zone: Education Act 2002, s.128.

<sup>131</sup> B. Downie, *Strikes, Disputes and Policymaking* (Kingston: IRC Press, 1992), 305.

duties are a principle of union that lead individuals to cooperate.<sup>132</sup> If unions protect employees' rights, then unions are imposing hindrances to the execution of management of duties. Seeking to enforce rights provides a means of resistance where resistance is viewed as entirely counter-productive and not in the public interest. Thatcher's charging of the Monopolies and Mergers Commission in 1988 with uncovering 'restrictive labour practices'<sup>133</sup> in TV and filmmaking provides an enlightening example.<sup>134</sup> The mandate of the Commission was to detect the following:

- (a) the practice of restricting the extent to which work is performed by workers who are not members of a particular trade union;
- (b) the practice of requiring that minimum numbers of workers (whether or not of specified descriptions) be engaged on particular productions or tasks.

In establishing the background to the report, the Commission provides prescient comments:

It is probable that the general perception of restrictive labour practices, as that term is commonly used, is that they stem from poor management, the misuse of union power or the power of a workforce able to act collectively. They may be attributed to the workforce unilaterally, to the workforce and management reaching collective agreements, or to management simply permitting the practices to evolve, perhaps as a trade-off on other issues. There are also general perceptions about the prevalence of such restrictive practices.<sup>135</sup>

The perception of the negative influence of unions and the constricting consequences embodied in collective agreements was at the forefront of this comment.<sup>136</sup> In 1988 the massive and controversial Education Reform Act 1988 was also introduced. The section 79 reference further evidences anti-union animus

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<sup>132</sup> M. Loughlin, 'The Functionalist Style in Public Law' (2005) 55 *University of Toronto Law Journal* 361, 400.

<sup>133</sup> The Commission's report being *A Report Under Section 79 of the Fair Trading Act 1973*, Cm. 666, 19.

<sup>134</sup> Fair Trading Act 1973, s.79: 'restrictive labour practice' means 'any practice whereby restrictions or other requirements, not being restrictions or requirements relating exclusively to rates of remuneration, operate in relation to the employment of workers in any commercial activities in the United Kingdom or in relation to work done by any such workers, and are restrictions or requirements which –  
(a) could be discontinued without thereby contravening the provisions of an enactment or of any instrument having effect by virtue of an enactment, and  
(b) are not necessary for, or are more stringent than is necessary for, the efficient conduct of those activities'.

<sup>135</sup> The Monopolies and Mergers Commission, n 133 above, 3.

<sup>136</sup> One example of this view is found in J. Campling, 'Labour Practices in TV and Filmmaking' (1990) 19 *Industrial Law Journal* 46, 46: 'The Prime Minister's comments about television being the "last bastion of restrictive practices" initiated a flurry of activity on the part of the Government to discredit both the broadcasting companies and trade unions. The MMC report was clearly intended to be one of the larger shells in the Government's arsenal.'

on behalf of the government of the day. The failure to uncover the skeletons in the union closet details more than a ‘propaganda victory’ for labour and TV companies,<sup>137</sup> because once the Commission had been charged with its task, two major networks started to abolish restrictive practices.<sup>138</sup> Although a reform process may have been underway at the time,<sup>139</sup> it remains hard to ignore the timing of the voluntary overhaul. The Commission believed that the calling of the Commission instigated change: ‘Fundamental changes are taking place in the industry at present both in general and in its employment and working practices [...] These changes in employment and working practices were very evident during the course of our inquiry, so much so that we were conscious, as it was put to us, that we were “shooting at a moving target”.’<sup>140</sup>

Evidence for both sides of the argument exist in the above example – and it may be noted that each has its own preconceptions about the other. It was this type of scenario – where a member of the public cannot clearly identify a winner or loser – that provided the leeway for individual biases to make determinative judgments. The animus against unions centred on their role as impediments to competition and efficiency. The rallying call of unions is the unfair treatment of unfettered, profit-driven interests. Ironically, the Monopolies and Mergers Commission in 1988 brought both of these attitudes out in the open.

Aside from branding a public sector collective as a form of impediment to efficiency, Summers’ contention that civil servants are in a vulnerable position because they are paid via taxes alludes to an idea of subjugation. Bundled within this concept is a sense of entitlement on the part of the public when it comes to civil servants. The presumption is premised on the idea that an individual pays for a service and so can demand a certain type of outcome. Taxpayers believe in prescribed entitlements for their money; though they are not necessarily aware of the full extent of the service provision costs. The adamant belief of these paying individuals has an impact. Politicians seek to address these concerns by relying on a form of subjugation of those civil service employees.

Civil servants have been hard-pressed to cultivate public support when they campaign for ‘fair pay’ or ‘better work conditions’.<sup>141</sup> An astute government can take advantage of an expandable public attitude to squeeze more from a civil service union so long as it is framed as a matter of fiscal responsibility where this term is used as a response to pay rise campaigns for public workers. This is not to say that the public would permit outright abuse of civil servants, but rather that it is an elastic boundary rather than a firm border. Put within the political framework, hostility towards government can be exceeded by a general disregard

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<sup>137</sup> *ibid*, 47.

<sup>138</sup> *ibid*, 46.

<sup>139</sup> Campling identifies this, *ibid*, 46.

<sup>140</sup> The Monopolies and Mergers Commission, n 133 above, 28.

<sup>141</sup> Though there is a long history of workers petitioning government for changes to existing law. S. Webb and B. Webb, *The History of Trade Unions* (London: Longmans, Green and Co Ltd, 1950).

for civil servants' best interests,<sup>142</sup> for, as Sniderman *et al* note, the turning point for tolerance of others' interests occurs when those interests negatively impact on our own.<sup>143</sup> And so, there has been a deepening of the distinction between the public and private sectors. State adoption of reflexive labour law – a theory which has developed within the vacuum of labour law theory – as a modern means of interaction with the private sector has been poorly received in public sector labour relations. The self-regulatory, enlightened notions,<sup>144</sup> which are meant to accompany reflexive labour law are absolutely cast aside where government is the employer in favour of prescriptive micro-management. As a result it may be wondered whether government has taken up the identity Kahn-Freund suggested: 'a social ideal of socialism' or the 'subordination of collective conflict and autonomy to the will of the state'.<sup>145</sup> The distrust of teachers has become an unofficial policy. Teachers stand not as professionals, but in the much more subordinated position of employees who must be directed with precise detail.

An updated version of the outline of public sector education labour relations may be stated. As a means of creating leverage, teachers' unions have taken to campaigning to draw public support for their members. These efforts have been met by government with a counteracting campaign. In the middle the public sits. There is an intriguing and unwitting fit here. There has been a crescendo of politicisation since the late 1960s (the age of quite significant teachers' unions activities) and it has reached its present point. The public wants to be consulted but on issues of structure,<sup>146</sup> and not, it seems, the details of programming. Public services must fit around the public's lives.<sup>147</sup> With both unions and government providing information on certain topics to the public, the current system of labour relations appears bespoke for the electorate. While the parties determine the topics, public opinion has been actively sought. Though a passive format as it situates the public in the role of casual observer,<sup>148</sup> this system nonetheless compels the public to be involved. The engagement point, as Sniderman *et al* note,<sup>149</sup> will be how the plan affects the individual: good plans cease to be so when they are viewed as infringing on the individual. Without being cynical, there is a perception of influence enjoyed by the public, for the potency of messaging and public relations cannot be underestimated in their ability to shape the public's opinion. With a centralised system, the local framework has atrophied, and yet a

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<sup>142</sup> H. Arthurs, 'Corporate Self-Regulation: Political Economy, State Regulation and Reflexive Labour Law' in B. Bercusson and C. Estlund (eds) *Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions* (Oxford: Hart Publishing, 2008), 28.

<sup>143</sup> See generally Sniderman, et al, n 8 above.

<sup>144</sup> Arthurs, n 142 above, 30.

<sup>145</sup> R. Lewis, 'Kahn-Freund and Labour Law: An Outline Critique' (1979) 8 *Industrial Law Journal* 202, 205.

<sup>146</sup> Ipsos MORI, *2020 Public Services Trust at the RSA* (London: Ipsos MORI, 2010).

<sup>147</sup> *ibid*, 22.

<sup>148</sup> Political engagement has tended to be rather low. In England, for example, less than 20 per cent have played an active role locally in the last 3 years. *ibid*, 35.

<sup>149</sup> See Sniderman, et al, n 8 above.

desire for local engagement remains. In the following sections, the implications of this framework are considered.

## CONCLUSION

The respective eras under study stands out as one of transformation in public sector labour relations within both jurisdictions. These significant changes are consistent with those found more broadly in employment such as increasing limitations on the employment relationship; greater supra-national influence on national / provincial policy; and a decline in the use of collective action. Today the state is not a model employer; that is, a positive model for how to treat employees.<sup>150</sup>

Events in both England and Canada suggest intriguing parallels. There is an evolution of engagement with education management which starts with what we may call a *laissez-faire* attitude where teachers are given parameters within which to work, but the execution remains the decision of the individual teacher. A change occurs where there is some impetus to question the trust vested in individual teachers. For England, the crystallising event was the William Tyndale scandal, but the movement had already been initiated in the 1960s with government's direct involvement with the Burnham Committee due to its concern over public expenditure. For Ontario, there was no motivating scandal. Rather, in the infamous words of a Minister of Education, a crisis was created by the government. While the precipitating factor is different, the political advantage returns the symmetry between the two examples: after each incident a Conservative party had entered into office. In each jurisdiction, the Conservative era was one of conflict with teachers' unions and increased prescription of work. Following this period, a new, liberal party was elected; with a desire for less conflict. It would seem the conservative eras precipitated a wholesale, yet inevitable, change in attitude, after years of conflict.

Looking ahead, there are some points to monitor. From the perspective of a new public sector education relations framework for the 21st century, a certain amount of apprehension is detectable, and it has resulted in some assumptions; whether or not these assumptions have led to good decisions is another matter. One assumption was that centralisation of control over education is a good decision. It provided for consistency over the breadth of the jurisdiction in areas such as curriculum, student expectations, duties of teachers, and the demands of Local Education Authorities. The hypothesis may also be scrutinised in many ways. Indeed, the Coalition Government's plans of academies and free schools clearly demonstrate an effort to relinquish strict central control. Education has been placed in the most political of environments. Limitation (if not removal) of

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<sup>150</sup> Ironside and Seifert, n 2 above, 123.

local control is a step away from making education a matter of individual communities. However, it would appear – through such mechanisms as increased, even encouraged, parental involvement – these local concerns will continue to have a voice, but will not necessarily be resolved as local governance is limited in what it can do. Absence of an avenue for giving effect to local voice reveals why this move towards centralisation had value to the government at the time it occurred. In each instance a strategic purpose was served for the political party in power to make this decisive move. Both Conservative parties desired to be seen as active managers, and taking control was the definitive move. For that point in time, the decision was sound, if one limited the analysis to the inherent political value. However, as an on-going task of government it may not be a sound decision for such wholesale centralisation.

When each liberal government took over control from its conservative predecessor, the acerbic relationship between government and its teachers stood out as a key problem which had been inherited. Therefore, it did not matter much that centralisation had in effect said to teachers ‘we do not trust your work’. It remained consistent with the language of conflict. As we move along with a more prescriptive agenda, is this initial distrust not engrained to the point that it has become policy? In England, labour has placed significant emphasis on leadership in schools, and this would suggest some form of trust. This is trust in the hierarchy of responsibility. Education transcends the ‘chain of command’ formula, and this is most pertinent when considering assessment. With the paradigm of ‘performativity’, a desire exists to measure performance (‘whether of the individual pupil or of the institution as a whole’).<sup>151</sup> The data required is the work product of the individual teacher. If policy continues to casually allude to a distrust of teachers’ work, then it renders equivocal what confidence can be placed in any test.

Finally, these assumptions (centralisation of control and testing as a means of confronting distrust) pose recurring questions as education reforms continue to impinge on teachers’ workplace role. There is no evidence that centralised control of education provides better results. Furthermore, it remains unknown whether greater testing and prescription of work (which borders on ‘foolproofing’) results in smarter students. Both are ideas which have become operating guidelines for the management of public sector education. It is clear why these were selected – they made good political sense: the ensuing actions (premised on the assumptions) demonstrated that the government was actively engaged in this portfolio and had put in place ‘proper safeguards’ to ensure its effective functioning. These actions, however, were at arm’s length: they directed but did not equip. The whole system relied on good teachers who remained in the profession for their careers. Where

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<sup>151</sup> P. Broadfoot, ‘Empowerment or Performativity? Assessment Policy in the Late Twentieth Century’ in Phillips and Furlong, n 65 above, 136-137.

the workplace was a political hotbed and scrutiny was consistent, the idea of good teachers remaining in the profession may be a tough proposition.

To provide a final measure of how far things have moved, consider the following. In a study of English public employee unionism up to the early 1970s, Hepple and O'Higgins wrote of support between employer and employees. They concluded: 'Stability has been maintained through the willingness of both sides to work the system.'<sup>152</sup> While accurate to the authors' analysis, this same statement provides a measure of the current status of public sector education labour relations. The following reconstruction of this phrase reflects contemporary circumstances: the willingness of both parties to work the system poses a potential threat to the stability of labour relations. The meaning of 'working the system' has evolved into a competition of public relations strategies. With the public sitting in the middle, the battle of public relations strategies (itself a comment on the limitations of law as embodying *the* framework) signifies how far the system has been worked and how each party has 'worked it'.

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<sup>152</sup> Hepple and O'Higgins, n 42 above, 214.